Filed 2/23/09 In re N.J. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re N.J., a Person Coming Under the Juvenile Court Law.	B206875 (Los Angeles County Super. Ct. No. JJ13343)
THE PEOPLE, Plaintiff and Respondent, v. N.J., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Catherine J. Pratt, Commissioner, and Robert Ambrose, Juvenile Court Referee. Affirmed with directions.

Murray A. Rosenberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, James William Bilderback II, Supervising Deputy Attorney General, and Steven E. Mercer, Deputy Attorney General, for Plaintiff and Respondent.

N.J. appeals from an order continuing wardship entered following findings that she committed robbery with the personal use of a knife and two counts of assault with a deadly weapon. She contends that the evidence was insufficient to support the findings and that errors, that are conceded by the Attorney General, were made at the disposition hearing with respect to the calculation of her maximum term of confinement and predisposition credits. We affirm the order of wardship and remand for a new disposition hearing at which the errors may be corrected.

BACKGROUND

On the afternoon of January 17, 2008, Sophia A. and her daughters, six-year-old Adriana A. and 10-month-old Andrea A., arrived by car at their at their 76th Street residence in Los Angeles following a visit to the doctor's office. As Ms. A. was holding Andrea upon taking her out of the car, two African-American girls approached and asked what time it was. Both wore sweatshirts with fur-lined hoods.

After Ms. A. responded that she was not wearing a watch, one girl nodded to the other and both pulled knives. Ms. A. attempted to push Adriana back into the car, but Adriana jumped out, wearing her backpack. One of the girls (the first assailant) grabbed the backpack and held a knife to Adriana's throat. Ms. A. hit the assailant, who let go of Adriana. Meanwhile, as Ms. A. screamed for help, the other girl (the second assailant) approached Ms. A. and made jabbing motions with the knife she was holding. The first assailant then pushed Ms. A. from behind, causing Ms. A., who was still holding Andrea, to fall to the ground. While Ms. A. was on the ground, the second assailant took her purse. Thereafter, both assailants fled. Ms. A.'s finger was cut during the incident, requiring sutures and a later surgery.

Ms. A.'s cousin, Sonia Flores, lived at the same address as Ms. A. While inside her home, Flores heard Ms. A.'s screams, looked out the window, and saw the assailants.

The next day, Ms. A. and Flores, both of whom are Spanish speakers, were interviewed separately by officers at the police station. Both identified a photograph of the minor as one of the assailants. Ms. A. also selected a photograph that she identified as the other assailant, although it was later established that that identification could not

have been correct. In selecting the minor's photograph, Ms. A stated that the girl in the photo was "around the same age. Also her features (face) resembles. Thin tall person. She looks exactly like her." The photograph Flores selected was of a girl who "look[ed] like she was there at the moment of the incident. She was calm. Her hair was blonde. I don't know if her hair was up. She was covered with a hood. And the jacket was black."

At trial, Ms. A. testified she feared retaliation for her testimony. She was 70 to 80 percent sure of her identification of the minor's photograph, but was unable to identify the minor in court. Flores was also unable to make an in-court identification.

The minor did not present any evidence in her defense.

DISCUSSION

1. Sufficiency of the Evidence

Asserting that the eyewitness identification evidence offered against her was confusing and contradictory, the minor contends that the findings of robbery and assault were unsupported. We disagree.

It is fundamental that evidence is "substantial" where, upon review of the entire record, it is found to be reasonable, credible, and of solid value. (*Jackson v. Virginia* (1979) 443 U.S. 307 [99 S.Ct. 2781]; *People v. Johnson* (1980) 26 Cal.3d 557.) "In making this determination, the reviewing court must consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment." (*People v. Mincey* (1992) 2 Cal.4th 408, 432.) """Although an appellate court will not uphold a judgment or verdict based upon evidence inherently improbable, testimony which merely discloses unusual circumstances does not come within that category. [Citation.] To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. . . ."" (*People v. Mayberry* (1975) 15 Cal.3d 143, 150.)

In determining the truth of the allegations against the minor, the juvenile court carefully analyzed the strengths and weaknesses of the evidence.

"The Court: All right. The court has considered the evidence. [¶] . . . [¶]

"I find this very difficult. I think that the evidence is not as clear as I would like to see it be.

"And we had some challenges in the presentation of the evidence. I want to address that first.

"With respect to the translation and the challenges to the translation of Miss Flores' testimony, my sense from observing Miss Flores and the interpreter was that a lot of that challenge was due to the fact that she was very adamant in wanting to describe things in the way that made sense to her as opposed to responding to the questions. I think that made it difficult for the interpreter. I also think that with respect to certain words and phrases there appears to be reasonable differences among native Spanish speakers as to how exactly certain words can be translated. That seems understandable to me.

"The idea that the word 'leather' and 'skin' and perhaps 'fur' may get confused may be a dialectical difference. I'm not sure. But I do believe that we got—I was able to understand the great majority of what Miss Flores was trying to convey, and any differences that she had or any confusion we had in her translation involved specifically that issue of skin versus leather versus fur that was around the edge of the hood.

"Frankly, that is a very minor point in this entire issue and minor to the issue of identification. So I do not believe that any challenges that we had in her testimony or in the translation of her testimony have meaningfully affected the evidence that has been presented to the court. And I put all of that on the record.

"I know that neither counsel made a big issue of that during closing, but I know that there is a distinct possibility that an appellate court will be looking at the record, and I wanted them to have the benefit of my observations, having been here.

"The second issue with respect to Miss Flores' testimony is that it is, I believe, of limited use in the case because she was not there at the time of alleged attack. And she was very clear about that.

"She identified a person, and whether or not that's [the minor] I'll leave for just a moment. She identified a person. But she was very clear that all she could say is this is a person who was there at the time she walked out of the house. And it was—and the only thing that she noted about her behavior or what she was doing was that she was calm. I think that that is of limited use as far as the court being able to determine whether it was [the minor] who committed the assault and the robbery.

"With respect to the identification issue, I think it is very difficult. Miss A[.] was able to go look at the pictures within 24 hours, which I think is relatively quick. She testified that she spent an hour to an hour and a half looking through the photos.

"My observation, having looked at the photo book—I don't know exactly how many photos were there, but I would say it's at least a couple of dozen; so there were several. The ones that I looked at did appear to all be African-American women. So there were a number of photos of people who looked similar, or arguably some of whom looked similar.

"When Miss A[.] saw the photos at the time of the identification, she writes—and this is from People's 1—that picture 12 is—the person is picture 12, quote (reading:)

"Is around the same age. Her features resemble.

"And then that sentence is not finished.

"She said: (reading:)

"A tall thin person.

"She then says: (reading:)

"She looks exactly like her.

"That is a quote. (reading:)

"And grabbed the six-year-old daughter and held a knife to her throat.

"Frankly, that's contradictory in my mind.

"I asked her specifically about that. And what I asked her when she was here:

"At the time that you looked at the pictures, what was your level of certainty that the person you identified in the photo was the person who was involved in the attack?

"And her estimate was it was 70 to 80 percent.

"I think that's the most concrete information that we have, frankly. And in People's number 1, she goes on to say with respect to the other identified person who is not a defendant and could not be a defendant, that: (reading:)

"That person is similar to the other person in her smile, eyes, skin tone, a little thinner and tall.

"It is similar language. It is not exact language. I don't know. To me it implies a higher level of uncertainty than the language she used about the person in picture number 12. But frankly, I believe we're splitting hairs at that point. I don't know that either one of them is really as definite as I would want to see.

"So what I'm left with is a 70 to 80 percent conviction that the person she identified in the picture was the person that did it. That was something she concluded with 24 hours of the event.

"Someone else who was there, Miss Flores, picked out the same person in the pictures. Now, Miss Flores didn't know what that person had done, but she had put her at the scene, which was significant. But other than that, it certainly doesn't get me over the hump of reasonable doubt.

"And then we get to the courtroom identification.

"We had a number of challenges on Friday afternoon, one of them being a technical problem with the court reporter's equipment. The effect of that was there were two separate occasions on which Miss A[.] was asked to identify someone in the courtroom:

"Is there anyone in the courtroom who looks to you like the person who was there?

"One of them was captured on the record, the other was not because of our technical difficulty.

"Her response was, as I recall, substantially the same. On both occasions of being asked the question, she hesitated for a significant period of time. She did not want to look around the courtroom. She became tearful, she became very nervous. She was

obviously not comfortable testifying at all, but she became significantly more nervous and agitated, at least by appearance, when asked specifically that question.

"The idea that comes to my mind is if—

"First of all, she did not answer the question so we don't have an effective answer on the record. And if there was not someone in the courtroom who resembled the person who she believed was involved, I think she would have happily said that because she did not want to identify anyone and create any problems for her family. She—

"I think if she had thought that the person here in the courtroom was not involved, she would have said that because that would have gotten—that would have been the least risk for her family. And that appeared to be, to the best of my ability, what was going through her head. But again, I am interpreting what she was thinking because she did not answer the question.

"So we get to whether or not this is enough for me to conclude beyond a reasonable doubt that [the minor] was the person involved. Frankly, I think that is a very difficult legal question, and I think reasonable minds will differ. I thought a number of times over the past few days about the fact that if this were a jury trial, I am pretty convinced you wouldn't get 12 jurors to answer the question in the same way.

"But it is a bench trial, and it is my opinion only.

"Looking at Penal Code section 1096, as well as the jury instructions on the issue, looking at the definition of 'reasonable doubt,' and I'm quoting: (reading:)

"It is not a mere possible doubt because everything relating to human affairs is open to some possible or imaginary doubt. It is the state of the case which after the entire comparison and consideration of all the evidence leaves in the minds of the jurors—or in this case, in my mind—in that condition that they cannot say they feel an abiding conviction of the truth of the charge.

"Having instructed jurors in the past and having asked for a definition of an 'abiding conviction' because I think that that is not a term that is obvious to many people, the definition of that I have found in the case law is that it is a conviction that you think

will be with you; that tomorrow you think it will be the case, a month from now you think it will be the case, and you don't believe that you are going to vacillate on that.

"So based upon that, that is the gut feeling that I am going on at this point. Part of that is based upon the fact that it has been three days, four days since we first looked at the evidence, and I have to say that based upon what I have heard, I do believe it was [the minor] who was present, and I do believe that there is significant evidence. And I have to say that I do believe it gets me beyond a reasonable doubt that it was [the minor] that participated in the event on January 17th.

"Again, I feel that that is a very close call. I think reasonable minds will differ. But that is the best answer I can give based upon what I have heard.

"So based upon that, I am going to sustain the charges in the petition."

Here, as in *In re Gustavo M.* (1989) 214 Cal.App.3d 1485 at page 1497, "'there is in the record the inescapable fact of in-court eyewitness identification. That alone is sufficient to sustain the conviction.' [Citation.] Next, when the circumstances surrounding the identification and its weight are explored at length at trial, where eyewitness identification is believed by the trier of fact, that determination is binding on the reviewing court. [Citation.] Third, the evidence of a single witness is sufficient for proof of any fact. [Citations.]" Accordingly, the minor's contention of insufficient evidence must be rejected.

2. Disposition Issues

The minor was ordered to six months of camp community placement and a maximum term of physical confinement of 7 years 4 months. The minor concedes that there is no indication in the record as to how the court calculated the maximum term but argues the "total would appear to reflect the juvenile court computing [the minor's] maximum confinement time based upon the high term, 5 years, on count I [robbery], one-third the term, 4 months, on the [weapon use] allegation as to count I and one-third the midterm, 1 year each as to counts II and III [assault]." The minor continues that this calculation includes an implied finding of separate intents as to the robbery and assault of Ms. A. in violation of Penal Code section 654. The minor further contends that she

should have been awarded 44, rather than 43 days of predisposition confinement credit, and that the minute order of the disposition hearing erroneously fails to refer to any confinement credit at all.

The Attorney General aptly concedes that 44 days' confinement credit should have been awarded (suggesting that February 29, 2008, may have been omitted) but urges that rather than speculate as to how the court calculated the 7 year 4 month maximum term of confinement, the matter should be remanded to allow the court to set a maximum term according to law and correct the error with respect to confinement credit. We agree with the Attorney General's approach and shall remand for a new disposition hearing.

DISPOSITION

The order continuing wardship is affirmed, and the matter is remanded for a new disposition hearing at which the court may set a maximum term of physical confinement based on the facts of the case and award the minor a total of 44 days' predisposition confinement credit.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

BAUER, J.*

---

* Judge of the Orange County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.